

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition for Rulemaking of the)	RM No. 11338
National Association of Broadcasters to Permit)	
AM Radio Stations' Use of FM Translators)	

To: The Commission

**STATEMENT OF
NATIONAL PUBLIC RADIO, INC.**

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August 24, 2006

Summary

The above-captioned petition ("Translator Petition") seeks to authorize AM stations to use FM translator stations based on the important local service AM stations have long provided to the public. NPR agrees that AM stations provide a valuable public service, and we share the desire to improve the AM service. Indeed, if approving the rule changes proposed in the Translator Petition would enable AM stations to overcome interference problems without adverse consequences, we would wholeheartedly support the changes. In fact, if the rule changes were not limited to fill-in service, we foresee public radio licensees that operate AM stations providing more localized service by using FM translators to relay a nearby AM station rather than a more distant FM station.

That said, it is not entirely clear that the promised benefits would outweigh the potential costs to FM radio service. Regarding the technical difficulties facing AM stations, the Translator Petition offers only anecdotal evidence, and that evidence is contrary to the Commission's understanding of the propagation characteristics of the AM radio service. In addition, NPR is concerned that the authorization of 5000 or more AM stations to utilize FM translators could further congest an already densely packed FM band and potentially undermine existing FM services.

While NPR is uncertain whether the Commission should pursue the rules proposed in the Translator Petition, we know that simply authorizing a new class of eligible FM translator station applicants is not appropriate. In particular, there is presently no functional process for licensing FM translator stations, and we believe

the Commission must make a concerted effort to re-establish such a process. In addition, the Commission has recently cast uncertainty over its rules generally barring FM translators stations whose interfering contours overlap the protected service contours of existing FM stations. By unilaterally adopting an undesired-to-desired processing standard in such instances, the Commission has undermined the protection and certainty previously afforded FM stations and their present and future listeners. Accordingly, however the Commission decides to address the Translator Petition, it is imperative that the Commission attend to these other fundamental matters.

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Introduction

Pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. § 1.405, National Public Radio, Inc. ("NPR") hereby submits its Statement regarding the above-referenced petition for rulemaking proposing changes to Part 74 of the Commission's rules to permit AM stations to use FM translators.¹

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 800 public radio stations nationwide. NPR's members operate 46 AM stations, and an additional 11 AM stations, including 8 in Alaska, broadcast NPR programming. In addition to producing and distributing such award winning programs as *All Things Considered*[®], *Morning Edition*[®], *Talk Of The Nation*[®], and *Performance Today*[®], NPR operates the Public Radio Satellite Interconnection System and provides

¹ See Public Notice, Report No. 2782, File No. RM-11338, July 25, 2006 [hereinafter "Translator Petition"].

representation and other services to its member stations.

Argument

I. The Proposed Rule Changes Offer Some Promise, But the Costs To FM Stations Could Be Significant

In proposing rule changes to allow AM stations to license or otherwise use FM translators to retransmit their signal, the Translator Petition principally points to the historically important role of AM stations to the public and the enhanced service coverage that use of FM translator stations could afford. There is no disputing the important role that AM Stations have long served in delivering news, information, and cultural programming to local communities nationwide. We also have no reason to doubt that AM stations, like all broadcast stations, are confronted by an increasing number and variety of interference sources that may limit the authorized reach of their transmission facilities. We are concerned, however, that the benefits to AM stations could come at a significant cost to FM stations.

The Commission has long prohibited cross-service translating because of the different propagation characteristics of AM and FM radio transmission.² In particular, the groundwave propagation characteristics of AM service generally do not result in service voids. FM stations, by contrast, propagate in a line-of-sight pattern such that man-made and other obstructions interfere with reception. Thus, translators serve an important augmenting role for FM stations but have long been

² In the Matter of Amendment of Part 74, Subpart L of the Commission's Rules Pertaining to FM Translators, 49 R.R.2d 1499 (1981).

considered by the Commission to be unhelpful to AM stations.³

Based on anecdotal evidence contained in the Translator Petition, some AM stations experience interference because of geological and man-made conditions⁴ despite the propagation characteristics of their signals. In addition, many AM stations are required to significantly reduce power or discontinue operations at night to avoid interference, and the proposed rule changes permitting FM translators to originate programming as a means of serving the AM station's daytime coverage area during the nighttime would result in additional service to the public. For these stations, assuming the technical difficulties the Commission has previously cited could be overcome, FM translators could be used to provide coverage throughout the station's authorized daytime coverage area on a 24-hour/day basis.

For AM public radio stations, in particular, there could be an additional benefit if the rule changes were not limited to fill-in service. Many public radio station licensees, particularly state governments, use a variety of broadcast facilities, including AM stations, FM stations, and FM translators and boosters, to

³ See *id.* at ¶ 4 ("[I]f an AM station's signal is suitable for use as input to an FM translator, it should also be suitable within the service area of the FM translator for direct off-the-air reception as an AM signal."). See also *id.* at ¶ 6 (discussing technical difficulties associated with an AM station attempting to "feed" an FM translator.).

⁴ Translator Petition at 14.

⁴ In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, Notice of Proposed Rulemaking, 5 FCC Rcd 2106, 2116 (1990). Directional antenna nulls may occur in the AM service, leaving service voids. *Id.*

provide service to a statewide or other extended area. As institutions integrated into their local communities, public radio licensees strive to localize their services to the greatest possible extent.⁵ Although FM translators are not permitted to originate programming, a licensee can use a close-by FM station rather than a more distant one to "feed" the FM translator in a given area. In some cases, where a licensee is forced to use an FM translator to retransmit a distant FM station rather than a closer AM station, the prohibition on cross-service translators undermines efforts to localize public radio service. In these situations, eliminating the cross-service prohibition would result in more locally responsive service.

That is not to say that eliminating the prohibition on AM station's using FM translators is a simple or cost-free undertaking. Although the Translator Petition is correct in stating that authorizing AM stations to use FM translators is not unprecedented, it is a stretch to conclude that authorizing all AM stations to use FM translators is therefore justified or that it is consistent with the Commission's long term efforts to improve the AM service.⁶ It is true that the Commission has granted waivers to permit AM stations to use FM translators, but those waivers

⁵ Public radio stations localize their FM translator services by ascertaining the needs of listeners in the translator's service area and providing, *inter alia*, feature material, traffic and weather reports, community calendar reports, and public service announcements relevant to the community served by the FM translator station. See, e.g., Comments of Public Radio Regional Organizations, Appendix A, MM Docket 99-25, at 2, filed Aug. 22, 2005 (discussing the local services provided by 220 public radio translators).

⁶ Translator Petition at 15.

were granted in exceptional circumstances.⁷ Rather than improving the AM service, cross-service translating has also been viewed by the Commission as undermining the service because listeners would tend to migrate to the translator's FM frequency and away from the AM station.⁸

NPR is also concerned about the consequences for FM services generally of allowing AM stations to use FM translators. According to the most recently published data, there are 4,759 AM stations currently licensed and operating.⁹ As the Commission long ago recognized, the FM radio broadcast spectrum in many parts of the country is severely congested.¹⁰ Particularly with the authorization of the low power FM radio service, the demand for radio broadcast facilities has swamped the existing FM broadcast spectrum allocation.¹¹ The reserved FM

⁷ See Translator Petition at 15 (discussing waiver that allowed a Tennessee AM station to use an FM translator to overcome interference from an AM station in Cuba.) See also In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, Notice of Proposed Rulemaking, Report and Order, 5 FCC Rcd. 7212, 7221 n.59 (1990) ("Upon appropriate showing the Commission has accommodated Alaska's unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating.") [hereinafter "1990 Translator R&O"].

⁸ 1990 Translator R&O, 5 FCC Rcd at 7224.

⁹ Broadcast Station Totals as of March 31, 2006, rel. May 26, 2006. The Commission's database indicates that an additional 918 AM station construction permits have been issued. AMQ FM Radio Database, <http://www.fcc.gov/mb/audio/amq.html> (a/o Aug. 24, 2006).

¹⁰ Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 94 F.C.C.2d 152, 153 (1983) (concluding that "under the [then] present allotment rules, additional service cannot be offered to many parts of the nation where demand has not been satisfied.").

¹¹ See Conflict Between Applications and Petitions for Rulemaking to Amend

spectrum, in particular, is unavailable in many parts of the country because of the presence of television channel 6 stations,¹² among other reasons, and NCE broadcasters are dependent on access to non-reserved spectrum.

Authorizing thousands of AM stations to use new FM translator stations raises the prospect of significantly more FM translators than the 3882 currently authorized FM translator stations.¹³ Existing FM station licensees are likely to face several challenges. First, an FM station licensee would have to be even more vigilant in monitoring new broadcast applications to protect their authorized coverage area from the additional FM translator applications. Second, with increasing FM band congestion, exacerbated by an additional pool of eligible FM translator station applicants, FM stations would face diminishing opportunities to

the FM Table of Allotments, 7 FCC Rcd. 4917, 4919 (1992) (noting “the significant increase in the number of FM stations and the accompanying congestion in the FM band that has occurred since the formation of the FM Table of Allotments in 1964”); In the Matter of Creation of a Low Power Radio Service, Notice of Proposed Rulemaking, MM Docket No. 99-25; RM-9208; RM-9242, 14 FCC Rcd 2471, at ¶ 11, rel. Feb. 3, 1999 (noting that “the Commission received over 13,000 inquiries in the last year from individuals and groups showing an interest in starting a low power radio station.”).

¹² The Commission has long required reserved FM band NCE stations to protect the signals of adjacent channel 6 television licensees, which has prevented stations from fully utilizing the reserved FM spectrum in television channel 6 markets. See Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, Memorandum Opinion and Order, 58 R.R.2d 629, at 630-31 (1985); 47 C.F.R. § 73.525.

¹³ A search of the FMQ FM Radio Database, <http://www.fcc.gov/mb/audio/fmq.html>, results in 3882 licensed FM translator stations as of August 24, 2006. See also Broadcast Station Totals as of March 31, 2006, rel. May 26, 2006 (reporting 4049 FM translator and booster stations).

establish new or relocate existing translators.¹⁴ Third, an existing FM station that seeks to establish a new translator station or replace an existing one is more likely to confront competing FM translator applications that are mutually exclusive with its own application.¹⁵

Because there are both potential costs and benefits to the Translator Petition, NPR is not decidedly opposed to or in favor of the proposed rule changes. One thing of which we are certain, however, is that it would not be appropriate simply to authorize a new class of several thousand AM stations to obtain and/or use FM translators. There are serious problems with the Commission's current process of licensing FM translators, which are discussed below. Whether or not the Commission decides to pursue the rule changes proposed in the Translator Petition, we urge the Commission to address these problems.

II The Commission Must Address A Number Of Significant Issues Affecting The FM Translator Service

A. There is Currently No Functional Process For Issuing FM Translator Construction Permits

Before authorizing an additional category of eligible FM translator applicants, it is imperative that the Commission reestablish a functional process for

¹⁴ Given their public service mission and limited resources, public radio stations have long recognized the efficiency of using low power, and relatively low cost, translator stations to extend service to neighboring areas. As a result, public radio licensees often use translator stations as part of extensive "daisy chain" networks to extend service to as wide a population and in as economical a fashion as possible.

¹⁵ Under the Commission's Regulations, mutually exclusive FM translator applications are resolved by auction, in the case of non-reserved band translators, 47 C.F.R. § 74.1233(d), or by applying a point system in the case of reserved band translators, *id.* § 74.1233(e).

licensing new FM translator stations. When the Commission last opened a filing window¹⁶ for FM translator applications to operate on non-reserved FM spectrum -- in 2003,¹⁷ following a filing freeze of more than 5 years¹⁸ -- the Commission received more than 13,000 application, overwhelming the Commission's application processing capabilities.¹⁹ There has been a freeze on the filing of reserved-FM spectrum translator applications since April 2000.²⁰ We foresee little immediate prospect of the Commission adopting appropriate regulatory measures to prevent the filing or approval of speculative application, completing the processing of the outstanding applications, and opening a filing window for reserved FM band applications. Therefore, no matter how meritorious the Translator Petition may be, the Commission should address how it intends to resolve the backlog of pending applications and what measures are necessary to prevent speculative FM translator applications.

¹⁶ Currently, an entity desiring to construct a new FM translator station must wait until the Commission opens a filing window to submit an application.

¹⁷ FM Translator Auction Filing Window and Application Freeze, Public Notice, DA 03-359, Feb. 6, 2003.

¹⁸ See Implementation of Section 309(j) of the Communications Act, 12 FCC Rcd. 22363, 22388 (1997).

¹⁹ See In the Matter of Creation of a Low Power Radio Service, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6763, 6777 (2005). Since March 2005, the Commission has frozen the remaining applications submitted during that filing window. Id. at 6778.

²⁰ In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order, 15 FCC Rcd. 7386, 7437 (2000) [hereinafter "Comparative Standards R&O"].

As we have stated previously, NPR believes the Commission can and should complete processing the pending translator applications by taking steps to identify and then thoroughly investigate apparently speculative ones.²¹ For instance, the Commission might sort the pending applications based on applicant identity and attributable interest and then scrutinize the applications of applicants responsible for large numbers of applications. If speculators indeed filed large numbers of applications, they are unlikely to pursue the scrutinized applications, let alone demonstrate that they were in a position to construct and operate the proposed translators in accordance with applicable Commission rules.²² That is not to say the task would be simple, but the Commission needs to act.

Beyond the currently pending FM translator applications, the Commission must more aggressively deter speculation. When the Commission adopted the rules for resolving mutually exclusive noncommercial educational ("NCE") applications, it "especially asked for suggestions on how to prevent speculation and abuse in NCE licensing."²³ The Commission subsequently concluded that the NCE point system criteria, combined with window filing procedures, "should be sufficient to ameliorate the filing of large numbers of mutually exclusive applications by speculative, barely

²¹ NPR Reply Comments, In the Matter of a Low Power Radio Service, MM Docket No. 99-25, at 11-12, filed Sept. 21, 2005.

²² See, e.g., NPR Comments, In the Matter of a Low Power Radio Service, MM Docket No. 99-25, at 12-13, filed Aug. 22, 2005 (discussing the Commission's specific translator application filing requirements.)

²³ Comparative Standards R&O, 15 FCC Rcd. at 7420.

qualified, applicants."²⁴ The Commission specifically rejected limiting the number of applications that an entity could file in any given filing window, although it reserved the right to impose such a limit via public notice if future circumstances warranted.

Based on the experience of the last FM translator filing window, the Commission should consider whether common ownership of large numbers of translator stations -- on the order of hundreds of stations -- may be inherently inimical to the proper use of translator stations and, by extension, the public interest. In addition, the Commission should consider whether a translator network employing only a few full power origination stations and translators dispersed among a large number of states is consistent with the purpose of the translator service and the public interest. Assuming one or both turn are true, the Commission should also consider appropriate limits on the number of translator stations in which a single entity may hold an attributable interest and on the number of applications a single entity may file in a given translator filing window.

In any event, considering possible rule changes to enable the Commission to permit and then process applications for new FM translator applications is at least as important as authorizing a new class of entities to obtain or use FM translator stations.

B. The Commission Should Comply With Or Formally Modify Its Rules Authorizing FM Translator Stations Whose Interfering Contours Overlap a Full Service Station's Protected Service Contour

²⁴ Id. at 7422.

The Commission should also address the rules governing the siting of FM translators that pose an interference threat to full power FM stations. Currently, the Commission's rules bar a new FM translator application if its interfering contour would overlap the protected service contour of any other authorized station. Although there is a narrow exception to that rule, recent decisions of the Commission have cast significant uncertainty over the scope of that exception and the extent to which full power FM stations and their listeners are protected.

The rule provisions at issue were intended to ensure that FM translator stations do not cause, and can be expected not to cause, interference to any other commercial or NCE broadcast station. Subsection 74.1204(a) flatly states:

An application for an FM translator station will not be accepted for filing if the proposed operation would involve overlap of predicted field contours with any other authorized commercial or noncommercial educational FM broadcast stations, FM translators, and Class D (secondary) noncommercial educational FM stations; or it would result in new or increased overlap with an LP100 station,²⁵

While Subsection 74.1204(d) of the Commission's rules provides an exception to the broad prohibitory language of Subsection (a), the exception is a narrow one:

The provisions of this section concerning prohibited overlap will not apply where the area of such overlap lies entirely over water. In addition, an application otherwise precluded by this section will be accepted if it can be demonstrated that no actual interference will occur due to intervening terrain, lack of population or such other factors as may be applicable.²⁶

In the interest of protecting future radio listeners, Commission precedent had

²⁵ 47 C.F.R. § 74.1204(a).

²⁶ Id. § 74.1204(d).

previously reinforced the rule's admonition that a translator application is grantable, notwithstanding a prohibited overlap, only if terrain or other geophysical features, lack of population, or other comparable factors will prevent the occurrence of interference throughout the overlap area.²⁷

In Living Way Ministries, however, the Commission made an abrupt about-face, unilaterally rewriting Section 74.1204 to permit previously prohibited overlaps upon a showing of the absence of population within an area defined by applying a certain undesired-to-desired ("U/D") ratio of the Commission staff's devising. The Commission did so without explaining its departure from the clear language of the rule and prior Commission precedent, and without addressing the previously acknowledged insufficiency of using U/D ratios in this context.²⁸ Even if applying a U/D ratio were appropriate to determine whether an overlap should be permitted, moreover, the Administrative Procedures Act requires the Commission to amend its rules through notice and comment rulemaking rather than through an individual FM translator application.²⁹ Finally, notwithstanding the pendency of petitions

²⁷ Thus, in State of Oregon, the Commission reiterated that "[t]he term 'lack of population,' as used in § 74.1204(d), means no population in the overlapping coverage area between a full-service station and the translator station seeking a waiver of § 74.1204(a)." State of Oregon, Memorandum Opinion and Order, 16 FCC Rcd 4344,4345 (2001), aff'ing, 15 FCC Rcd 11842 (2000) (emphasis added).

²⁸ Simply put, in the case of a secondary service such as translators, the U/D ratio method is insufficiently predictive of interference and protective of existing FM stations. See Board of Education of the City of Atlanta, Memorandum Opinion and Order, 11 FCC Rcd 7763, 7764 n.1 (1996).

²⁹ See, e.g., American Federation of Government Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985) (An agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake

seeking reconsideration of the Living Way Ministries decision,³⁰ the Commission has since applied that decision as though it were a routine matter of *stare decisis*.³¹

NPR is troubled by the use of a U/D ratio in the context of licensing FM translators with prohibited overlaps because we question whether it affords sufficient protection and certainty to existing broadcast stations. The Commission's response has been to point to the Commission rule that requires FM translators, as secondary services, to remediate any interference that actually occurs once the FM translator station becomes operational.³² The Commission's response, though correct as far as it goes, assumes that the public will file formal interference complaints with the Commission if they encounter degradation in or loss of a previously-listened to broadcast signal. We think that assumption is mistaken. Confronted with impaired reception of a free, over-the-air service, we believe

similar procedures to accomplish such modification or repeal, and to provide a reasoned explanation for the change addressing with some precision any concerns voiced in the comments received); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329 (9th Cir. 1982) ("Adjudication allows an agency to apply a rule to particular factual circumstances and to provide an interpretation of the required conduct in light of those circumstances. An adjudicatory restatement of the rule becomes an amendment, however, if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct. An amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rule-making procedures.").

³⁰ See National Public Radio, Petition for Reconsideration, File No. BPFT-19981001TA, filed Oct. 9, 2002. San Bernardino Community College District, Petition for Reconsideration, File No. BPFT-19981001TA, filed Oct. 9, 2002.

³¹ See Educational Media Foundation, Memorandum Opinion and Order, 19 FCC Rcd. 5843 (2004), appeal pending sub nom. Kentucky Public Radio v. FCC, Case No. 04-1139 (D.C. Cir. filed Apr. 26, 2004).

³² See id. at ¶ 8; 47 C.F.R. § 74-1203(a)-(b).

listeners tend to elect one of a number of far simpler remedial measures: they tune their radios to another, interference free channel, they employ another electronic device, such as a CD or iPod, or they turn to alternative media.

We recognize, of course, that reasonable people, including the Commission and its staff, may disagree about the scope of protection existing stations should receive from proposed new services and the degree of certainty they should enjoy. The appropriate course for determining whether the existing rules are no longer adequate, however, is to conduct a notice and comment rulemaking proceeding so that the issue can be fully investigated and the Commission can benefit from the views of interested parties. Accordingly, however the Commission decides to address the issues raised by the Translator Petition, we urge the Commission to either comply with its existing rules or issue a Notice of Proposed Rulemaking to consider whether those rules should be revised to provide Commission staff and future FM translator applicants greater flexibility in the establishment of new FM translator stations.

Conclusion

The Translator Petition offers potentially significant benefits to AM stations whose coverage areas may be compromised by interference, but it also underscores no less significant issues regarding the FM translator service that the Commission must not delay in addressing.

Respectfully Submitted,

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August 24, 2006

Certificate of Service

I, Gregory A. Lewis, hereby certify that, a copy of the foregoing
Statement of National Public Radio was sent this 24th day of August, 2006, by
regular mail, postage pre-paid, to the following person:

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